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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1209

LOUIS BURALL, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES
PENITENTIARY, ALCATRAZ, CALIFORNIA

*ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE
GRANTING OF THE PETITION FOR A WRIT OF CER-
TIORARI**

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 31-33) is reported at 146 F. 2d 230, and the opinion of the district court (R. 16-21) at 53 F. Supp. 126.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 12, 1944 (R. 34). On March 2, 1945, petitioner's time to file a petition for a writ of certiorari was extended by order of

Mr. Justice Douglas until May 2, 1945 (Pet. 4). The petition for a writ of certiorari was filed April 27, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether it is improper for a district judge to whom a petition for a writ of habeas corpus is addressed to direct that the petition be filed with the district court for assignment in regular course in accordance with the rule of the court.

2. Whether denial of assistance of counsel at petitioner's preliminary hearing before a United States Commissioner at which petitioner entered a plea of not guilty invalidated his subsequent conviction.

STATUTE INVOLVED

The habeas corpus statute provides in pertinent part as follows:

R. S. § 752 (28 U. S. C. 452): The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty * * *

R. S. § 755 (28 U. S. C. 455): The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from

the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

R. S. § 761 (28 U. S. C. 461): The court, or justice, or judge, shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

STATEMENT

In 1939, in the United States District Court for the Southern District of Illinois, petitioner, who was represented by counsel appointed by the court, was convicted after a jury trial under an indictment charging assault on a custodian of the mails and mail robbery, and was sentenced to imprisonment for 25 years. See *Burall v. Johnston*, 134 F. 2d 614 (C. C. A. 9), certiorari denied, 319 U. S. 768. In September 1943, he sent to District Judge Roche of the District Court for the Northern District of California a petition for a writ of habeas corpus in which he alleged that his conviction and sentence were void for the reason that he had been denied the right to assistance of counsel at a preliminary hearing before a United States Commissioner (R. 3-13). In his application petitioner stated that he did not desire Judge St. Sure or Judge Welsh to consider his petition "as they had previously denied his applications for writ of ha-

beas corpus" (R. 5; see also R. 6, 9, 18).¹ Judge Roche directed the clerk of the court to file the petition and it was assigned to Judge St. Sure in regular course pursuant to the rule of the district court (R. 16).² Judge St. Sure issued an order to show cause (R. 14) and appointed an attorney to represent petitioner (R. 15). He subsequently filed an opinion holding that he had authority to consider the petition for a writ of habeas corpus even though it had been addressed to Judge Roche, and that the petition was insufficient on its face (R. 16-21). Accordingly, he entered an order dismissing the order to show cause and denying the petition (R. 22). The other three judges of the district court signed Judge St. Sure's opinion, stating that they were in accord with the views there set forth (R. 21).

On appeal to the Circuit Court of Appeals for the Ninth Circuit, the order of the district court was affirmed (R. 34).

¹ For a statement of these prior habeas corpus proceedings, see Memorandum for the Respondent, No. 987, October Term, 1942.

² Rule 1 of the Rules of the District Court for the Northern District of California provides:

"All actions and proceedings of whatsoever kind or nature—including criminal, admiralty and bankruptcy—shall be assigned to the several Judges in regular rotation by the Clerk. Such assignment shall be made immediately upon the filing of the first document, and shall be indicated by placing the initial letter of the Judge's surname after the case number. No change in any assignment shall be made except by Court order approved by the Judges affected." (See R. 32-33.)

ARGUMENT

Petitioner contends (Pet. 5-14, 17-24) that under 28 U. S. C. 455, providing that "The court, or justice, or judge" to whom a petition for a writ of habeas corpus "is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto," the judge to whom a petition is addressed must decide in the first instance whether the writ shall issue, and that he is without power to refer the petition to the court for assignment in regular course pursuant to the rules of the court. As the opinion of the circuit court of appeals indicates (R. 32), this question has recently been raised in several cases in that court as the result of the opinion expressed by Circuit Judge Denman in *Rutkowski v. Johnston*, 52 F. Supp. 430, that a petition presented to a judge of a district court must be heard by that judge and cannot be assigned to another judge of the court. The question was recently before this Court in a slightly different form on the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit in *O'Keith v. Johnston*, 146 F. 2d 231, certiorari denied, April 9, 1945, No. 1005, this Term.

We think that the decision below is clearly correct in rejecting the construction urged by petitioner. As District Judge Goodman stated in his opinion in *Wright v. Johnston*, 49 F. Supp. 748, 749 (N. D. Cal.), which the court below approved

in the instant case as a "correct statement of the law" (R. 32), Section 455 was not intended to enable a petitioner to "select a judge whom he might consider more favorably disposed to his cause than other judges of the same court equally available." That section and the requirement of 28 U. S. C. 461 that "The court, or justice, or judge shall proceed in a summary way" to decide the issues, do not "deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it." *Ex parte Royall*, 117 U. S. 241, 251; *Ex parte Collins*, 154 Fed. 980, 982 (C. C. N. D. Cal.), affirmed *sub nom. Collins v. O'Neil*, 214 U. S. 113. The rule of the district court providing for the assignment of cases to the judges in regular rotation (see fn. 2, p. 4, *supra*) is clearly designed to insure orderly procedure and was promulgated pursuant to its general authority to make rules for the conduct of its business (28 U. S. C. 731) and the power specifically granted by Section 23 of the Judicial Code (28 U. S. C. 27) whereby the judges of district courts having more than one judge are authorized to "agree upon the division of business and assignment of cases for trial." It is to be noted, moreover, that under 28 U. S. C. 452 an application for a writ of habeas corpus may be made to a Justice of this Court or a judge of the circuit court of appeals, as well as to a judge of the district court. And it has been held, contrary to the contention petitioner makes here, that such an appli-

cation will not be considered by a judge of the appellate court when it could, with equal facility, be made to a district court or a district judge. *United States v. Hill*, 71 F. 2d 159 (C. C. A. 3); *Sweetney v. Johnston*, 121 F. 2d 445 (C. C. A. 9), certiorari denied, 314 U. S. 607.

2. On the merits, the petition for a writ of habeas corpus was properly denied as insufficient on its face. Assuming, as petitioner contends (Pet. 14-15, 24-30), that denial of assistance of counsel at a preliminary hearing is improper and may, under certain circumstances, constitute a violation of a defendant's constitutional rights (see *Wood v. United States*, 128 F. 2d 265 (App. D. C.)), such impropriety did not vitiate the jurisdiction of the convicting court to try petitioner on the indictment subsequently returned against him. Although petitioner alleged that upon his appearance before the commissioner he was denied a continuance for the purpose of enabling him to communicate with counsel and that he "then demanded counsel to represent him, but instead of counsel he was told to plead," he admitted that he pleaded not guilty before the commissioner (R. 10). He did not allege that he was without counsel at the time of his trial, and the fact is, as revealed in his prior habeas corpus proceeding, that he was represented by appointed counsel at that time (see p. 3, *supra*). Under such circumstances the absence of counsel at the preliminary hearing did not prejudice petitioner and does

not invalidate his conviction. *Price v. Johnston*, 144 F. 2d 260 (C. C. A. 9), certiorari denied, December 18, 1944, No. 607, this Term;³ *DeMaurez v. Swope*, 104 F. 2d 758, 759 (C. C. A. 9); cf. *Mumforde v. United States*, 130 F. 2d 411, 414 (App. D. C.), certiorari denied, 317 U. S. 656; *McJordan v. Huff*, 133 F. 2d 408 (App. D. C.).

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or unsettled question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.

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MAY 1945.

³ See our Memorandum in Opposition in that case, pp. 9-10.

